

No. 16-1410
United States Court of Appeals
for the
Federal Circuit

TINNUS ENTERPRISES, LLC and ZURU LTD.

Plaintiffs-Appellees

v.

TELEBRANDS CORP. and BED BATH & BEYOND INC.,

Defendants-Appellants

ON APPEAL FROM THE
DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

**NON-CONFIDENTIAL APPELLEES' MOTION FOR LEAVE TO
SUPPLEMENT THE RECORD AND APPENDIX**

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Attorneys for Appellees Tinnus Enterprises, LLC and ZURU Ltd.

CERTIFICATE OF INTEREST FOR TINNUS ENTERPRISES, LLC

Counsel for respondent Tinnus Enterprises, LLC certifies the following:

1. The full name of every party represented by me is: Tinnus Enterprises, LLC
2. The name of the real party in interest represented by me is: Tinnus Enterprises, LLC
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock in the company represented by me are: None
4. The names of all law firms and partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

DUNLAP BENNETT & LUDWIG

Thomas M. Dunlap
Robert Spendlove
David Ludwig
Cortland C. Putbrese
Eric Olavson

FINDLAY CRAFT

Eric H. Findlay
Debby Gunter

Date: April 21, 2016

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CERTIFICATE OF INTEREST FOR ZURU LTD.

Counsel for respondent ZURU Ltd. certifies the following:

1. The full name of every party represented by me is: ZURU Ltd.
2. The name of the real party in interest represented by me is: ZURU Ltd.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock in the company represented by me are: None
4. The names of all law firms and partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

DUNLAP BENNETT & LUDWIG

Thomas M. Dunlap
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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, applicable case law, and the inherent equitable powers of this Court, Appellees, Tinnus Enterprises, LLC and ZURU, Ltd. (collectively, “Appellees”) respectfully request that this Court grant leave to supplement the record and appendix with the attached documents which total nine (9) pages and are not part of the district court record below. Appellees seek to supplement the appendix with these documents to refute Appellants’ assertion that the lower court acted improperly “by observing that Appellants had not yet denied copying.” (Dkt. 32 at p. 27 of 72.) Appellants appear to argue on appeal for the first time that Telebrands Corporation (“Telebrands”) did not copy Appellees’ product. To respond to Appellants’ new argument, Appellees need to refer to the attached documents. These documents demonstrate that Telebrands did indeed copy Appellees’ product—and further demonstrate why Appellants never denied this fact in the lower court proceedings.

This Court may properly consider these documents in light of considerations of justice, judicial efficiency, and in view of the lesser formality and haste of preliminary injunction proceedings. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (appellate court retains broad discretion to supplement the record on appeal when “injustice might otherwise result.”); *Schwartz v. Million Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003) (“[w]e decide on a case-by-case basis whether an appellate record should be supplemented [with material not before the district

court]. Even when the added material will not conclusively resolve an issue on appeal, we may allow supplementation in the aid of making an informed decision.”); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984) (recognizing inherent authority of appellate court to supplement with materials not before the lower court); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (“given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits”); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) (courts at the preliminary injunction stage “may rely on otherwise inadmissible evidence, including hearsay evidence”).

Here, the additional documents that Appellees seek to include in the appendix will assist this Court in understanding why Appellants failed to dispute in the lower court proceedings the allegation by Appellees that Telebrands had copied Appellees’ product. *See Schwartz*, 341 F.3d at 1225 n.4 (granting motion to supplement with documents that provided the appellate court with “a better understanding of the information Appellants possessed at the time these cases were pending”). Counsel for Appellees represents to the Court that these documents are true and accurate copies. For these reasons, Appellees respectfully request that this Court grant their motion to supplement the record and appendix.

Appellees have discussed this motion with Counsel for Appellants and they have advised they will be opposing the motion.

Dated: April 21, 2016

Respectfully submitted,

/s/ Thomas M. Dunlap

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2016, I electronically filed Non-Confidential Appellees' Motion For Leave To Supplement the Record and Appendix with the Clerk of the Court using the CM/ECF system. The Notice of Docket Activity that is generated by the court's CM/ECF system constitutes service of this document on all attorneys of record at the following addresses:

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CONFIDENTIAL MATERIAL OMITTED

The material omitted describes the circumstances of which appellees' Bunch O Balloons was copied by Telebrands and/or its contractors when creating the Balloon Bonanza product.

**PAGES SAppx1-9 HAVE BEEN
OMITTED DUE TO
CONFIDENTIAL MATERIAL**